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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 393

HARRY J. WISNER,

Appellant,

vs.

KATHLEENE KAMINSKI, A.K.A. CATHERINE MILLER WISNER KAMINSKI

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

RALPH ATKINSON,
Counsel for Appellant.

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SUPREME COURT OF OHIO

No. 31333

APPEAL FROM THE COURT OF APPEALS OF COLUMBIANA COUNTY, OHIO

In re GUARDIANSHIP of CATHERINE MILLER WISNER, now KATHLEENE KAMINSKI, formerly a minor

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KATHLEENE KAMINSKI,
Applicant-Appellee,

vs.

HARRY J. WISNER,
Appellant.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

I

Attention is called to paragraph 1 of Rule 7. It provides in part as follows:

"1. Every motion to the Court shall • • • state clearly its object and the facts on which it is based."

It is respectfully submitted that the Motion to Dismiss or Affirm of the appellee, Mrs. Kaminski, contains no statement whatever of the facts on which it is based.

II

It is respectfully submitted that Mrs. Kaminski's contra-jurisdictional statement is as frivolous as her Motion to Dismiss or Affirm. At one point only does it contain statements that are pertinent to the question of jurisdiction, and the statements at that point are untrue.

Unfortunately, it is impossible to ignore entirely the rest of the matter in the contra-jurisdictional statement; it too contains misleading passages. Insofar as such passages relate to material facts, it is necessary to point out and correct them in what follows; the facts of the case can be kept straight in no other way.

A

On page 2 of the contra-jurisdictional statement, the following passage appears:

> "During the minority of her ward the guardian filed five interim accounts and upon the ward's reaching her majority a sixth and final account was filed. All of these accounts were attacked by exceptions filed by the ward, which exceptions remain unheard and undisposed of in the Probate Court of Columbiana county, Ohio."

This passage is misleading for two reasons:

First, it does not state what happened between the filing of Mrs. Wisner's six accounts and the filing of Mrs. Kaminski's pretended exceptions, to wit: The Probate Court duly heard, approved and settled each of said six accounts within thirty to seventy days after Mrs. Wisner filed it.

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Therefore, when Mrs. Kaminski filed her pretended exceptions, all six of Mrs. Wisner's accounts were accounts settled. Mrs. Kaminski's implication that they were still open is untrue.

Thus, *second*, whether the pretended exceptions have ever been before the Probate Court for hearing and disposition, even potentially, and therefore whether they can truthfully be said to "*remain* unheard and undisposed of", depends on whether Mrs. Kaminski did or did not commence against her mother an action to open said accounts of which the pretended exceptions could form a part. Mr. Wisner, for the reasons stated on page 21 of his Jurisdictional Statement (hereinafter referred to as "J.S."), denies that any such action was ever commenced. The Probate Court's judgment left the question undecided (J.S. 41).

Mrs. Kaminski has of course rendered extended discussion of her claim that she commenced such an action impossible by having the Probate Court transmit to the Court of Appeals a record which does not contain the pleadings on which her claim is based (J.S. 21). Indeed, it would be necessary to go outside the record in order to discuss her claim at all.

B

On page 3 of Mrs. Kaminski's contra-jurisdictional statement, the following appears:

> "At no time in any court did the appellant ever advance the claim that Section 10506-55 of the General Code of Ohio was repugnant to the constitution of the United States. The appellant does not make that claim at the present time."

These statements are the only statements contained in Mrs. Kaminski's contra-jurisdictional statement that are

pertinent to the question of jurisdiction. They are, of course, untrue. The facts are as follows:

Mrs. Kaminski's ambiguous "Application to Appoint Successor Fiduciary" was filed under pretended authority of §10506-55 (see J.S. 38-40 and contra-jurisdictional statement, page 2). Mr. Wisner, in his original brief in the Court of Appeals (which was the court of first instance with respect to him), attacked the validity of said application on the ground that it was repugnant to the XIV Amendment. (See Exhibit A, appendix to this brief.) He again attacked its validity on the same ground in his Memorandum of Additional Authority duly filed in the Court of Appeals five days before oral argument, specifically citing §1 of the XIV Amendment (J.S. 43-44). The constitutional question thus raised was the only question argued orally ond his behalf at the hearing (J.S. 44-45).

The decision of the Court of Appeals (J.S. 45) held the "Application to Appoint Successor Fiduciary" to be a valid pleading authorized by §10506-55. When the decision was announced, Mr. Wisner at once attacked the validity of §10506-55 as thus construed and applied on the same ground previously urged against the application itself, doing so before judgment (J.S. 47-48).

The other three constitutional questions concerning the validity of §10506-55 as construed and applied by the Court of Appeals of course did not arise until the Court of Appeals had, by its decision, first given it the construction and application now complained of. They could not have arisen earlier; the construction given §10506-55 was one which was not, and could not have been, anticipated. When the decision of the Court of Appeals was announced, the validity of §10506-55 as construed and applied by said decision was forthwith attacked, *before* judgment, by timely application for rehearing on the ground that such construction rendered

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§10506-55 repugnant to §1 of the XIV Amendment (J.S. 46-48).

All the constitutional questions now raised concerning the validity of § 10506-55 as construed and applied by the Court of Appeals were explicitly raised by the assignment of the errors committed by the Court of Appeals that was addressed to the Supreme Court of Ohio (J.S. 11-13). They are also explicitly raised by the assignment of the errors committed by the Supreme Court of Ohio now addressed to the Supreme Court of the United States.

Considerable care was expended during the preparation of Mr. Wisner's Jurisdictional Statement to make it crystal clear that Mr. Wisner has complained of the validity of § 10506-55 as construed and applied by the Court of Appeals from the moment the construction and application complained of occurred. It is believed that his Jurisdictional Statement does make this fact clear. It is believed to be perfectly clear from his present Assignment of Errors (which see) that he complains of it now.

Since it is untrue that Mr. Wisner failed to raise in a timely manner his claim that, as construed and applied in this case, §10506-55 is repugnant to §1 of the XIV Amendment to the Constitution of the United States, the interesting and valuable authorities cited by Mrs. Kaminski serve simply as illustrations of Mr. Wisner's fulfillment of all jurisdictional requirements.

C

A passage on page 5 of the contra-jurisdictional statement seems to imply that judgments of the Supreme Court of Ohio which recite that "no debatable constitutional question is involved" occupy a special position, more impregnable than that of ordinary judgments. Any such implication is of course unwarranted. Where such judgments in fact

adjudicate constitutional questions erroneously, they are reversed. (*E.g.*, first three cases cited, J.S. 25.)

D

On page 5 of Mrs. Kaminski's contra-jurisdictional statement, she says:

> "It is obvious that the claimed constitutional questions urged by appellant are not substantial. The appellant had his day in court on his own motion and will still have ample opportunity to make any appearance he may see fit when the exceptions to the guardian's accounts are assigned for hearing and determined. This case presents a situation wherein a simple proceeding to hear and determine exceptions to a state court guardian's accounts has been complicated and delayed by the technical maneuvering of appellant's counsel."

This passage presents three points that require attention:

1

First is the implication woven into the passage that Mr. Wisner would not be resisting the Court of Appeals' judgment throwing Mrs. Wisner's accounts open to Mrs. Kaminski's pretended exceptions unless Mrs. Wisner had been guilty of misconduct as guardian which he wanted to hide by keeping the accounts closed. Therefore, according to Mrs. Kaminski's implicit argument, the Supreme Court of the United States ought to overlook the fact that the Court of Appeals, when it condemned Mrs. Wisner's conduct as guardian and rendered its judgment opening her accounts, did so without inquiry and without trial. With inquiry and after trial, it is implied, the result would be the same.

Stating Mrs. Kaminski's implicit argument openly is no doubt an answer to it; it is perhaps likely to be some time before the Supreme Court of the United States holds that a

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mere surmise by a party in his own favor is a full substitute for proof of his claims and a fair chance for the opposite party to offer counter proof. However, the prejudicial effect of Mrs. Kaminski's implication that her father has something to hide in connection with her mother's accounts to some extent still remains.

For Mrs. Kaminski to inject such an implication into this case is, under the circumstances, seriously improper. A moment's glance at her pretended exceptions would be sufficient to illuminate the position in which Mr. Wisner has been placed. However, her pretended exceptions are not in the record. The record she had the Probate Court transmit in support of her appeal to the Court of Appeals omits them.

A brief summary of the chief contents of Mrs. Kaminski's pretended exceptions and of the effect of the Court of Appeals' judgment when considered in connection with them is set forth below in the margin. To the extent that this summary describes Mrs. Kaminski's pretended exceptions and mentions certain related matters, it goes outside the record, although only to the extent necessary to meet the implication injected by Mrs. Kaminski. It is relegated to the margin so that the Court can readily ignore it if, in spite of the circumstances, even this limited excursion outside the record is considered improper.[1]

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[1] There are 552 of Mrs. Kaminski's pretended exceptions. They attack nearly every expenditure made by Mrs. Wisner as guardian during the 19 years of the guardianship. The vouchers that evidence said expenditures, following an immemorial practice in the Probate Court of Columbiana County, Ohio, consist to a large extent of cancelled checks. The cancelled checks naturally give no information except that certain sums of money have been paid out, to whom, and when.

The pretended exceptions consist largely of attacks on the technical sufficiency of Mrs. Wisner's vouchers. For example, out of the 552 pretended exceptions, 333 attack vouchers on the ground that they fail to show affirmatively that the expenditure involved was "for the ward's benefit," and 170 attack still other items, including both expenditures and receipts, on the ground that the item in question "is not sufficiently explained."

2

The second point that requires attention in connection with the passage quoted above is the statement that Mr. Wisner "had his day in court" with respect to the matters adjudicated by the Court of Appeals.

It is of course true that Mr. Wisner has had at least a technical day in court with respect to certain questions adjudicated by the Court of Appeals, to wit, the constitutional questions now brought to the attention of the Supreme Court of the United States by this appeal. The Court of Appeals listened to his oral argument, it received his application for rehearing arguing the new constitutional

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As long as Mrs. Wisner's accounts remained settled, these technical flaws in the vouchers, if they are flaws, were of no practical moment. They are in no way suspicious and, if an opportunity to plead had arisen, the plea of "account settled" would have been a complete defense to them.

However, the picture has now changed drastically. The Court of Appeals, without having the pleadings before it and with no means of knowing their contents, has found that before Mrs. Wisner's death, Mrs. Kaminski started a valid action against her to open her accounts. Also, without hearing or trial and with no means of knowing the relevant facts, the Court of Appeals has revived said alleged action, has found Mrs. Wisner guilty of some offense (whether of fraud or of something else is unknown), has annulled the settlements of all six of her accounts, has thrown them open to Mrs. Kaminski's pretended exceptions, and has ordered the Probate Court "to hear and settle" said alleged exceptions.

If the Probate Court should find as a fact that the 333 vouchers do not affirmatively show that the expenditures in question were "for the ward's benefit" and that the 170 items are "not sufficiently explained," it would be compelled to call on Mr. Wisner for other proof of the items in question. With Mrs. Wisner dead, with the youngest of the items nearly eight years old and with the oldest of them nearly twenty-six years old, it is apparent that Mr. Wisner could not furnish "other proof" of more than a handful of the items. Thus it is perhaps evident that, if the judgment of the Court of Appeals were sustained, liability would almost certainly run far into five figures.

The shocking thing about the situation in this case is not merely that it can exist without a shred of proof in any court of the slightest inaccuracy in Mrs. Wisner's accounts; it is still more shocking that such a situation can exist when the only court with access to the pleadings has not even held that a valid action to open Mrs. Wisner's accounts was ever commenced.

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questions raised by its docket entry, it rendered judgment against him.

With this exception, however, Mrs. Kaminski's statement is untrue both technically and in fact. A "day in court" means a day in court on the *merits* of the questions decided. It means a chance to know what you have to meet. It means a chance to introduce evidence on questions of fact. It means a chance to have *all* questions decided by a court that has some means of knowing what the merits of each question decided are.

On the other questions adjudicated by the Court of Appeals, Mr. Wisner had no such chance. Under its adjudication, he would never have any such chance.

3

The third and last point concerns Mrs. Kaminski's statements that this case "has been complicated and delayed by the technical maneuvering of appellant's counsel" (passage quoted above) and by "the technical questions raised by counsel for the present appellant" (page 3).

As the record discloses, the "questions raised" were questions about the legality of adjudicating Mr. Wisner's rights against him when he had not been heard. The "maneuvering" consisted of efforts to forestall such an outcome.

The questions and maneuvers alike were, obviously, procedural. They were therefore no doubt "technical." However, that does not necessarily and irretrievably damn them. As Mr. Justice Douglas has recently pointed out ("Procedural Safeguards in the Bill of Rights," 31 *Journal of the American Judicature Society* 166, 167-9), many of the most vital constitutional safeguards are purely procedural. There are few if any constitutional liberties or immunities which, if attacked, "will not lose by default" unless someone's lawyer, proceeding in the proper manner

at the proper time in the proper tribunal, keeps them alive by raising the "technical questions" and engaging in the "technical maneuvering" necessary to vindicate them.

WHEREFORE: Appellant Harry J. Wisner respectfully submits that appellee's Motion to Dismiss or Affirm and her contra-jurisdictional statement are frivolous, that said motion should be overruled, and that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Judicial Code § 237(a), 28 U. S. C. § 344(a), 28 U. S. C. A. § 344(a).

Respectfully submitted,

RALPH ATKINSON,
Attorney for Appellant.

APPENDIX

Exhibit A

Excerpt from Appellee's Brief in Court of Appeals

"*Second,* the application [to Appoint Successor Fiduciary] violates due process, contrary to the XIV Amendment, in that, like appellant's previous pleadings herein, it leaves what the adverse party is required to meet to speculation. Its ambiguity is such that we do not even *think* we know which view of it is correct. We have no way of knowing whether this Court [*i. e.,* the Court of Appeals] will take the same view of the application as the Probate Court or the opposite view. We have therefore been forced to try to brief both views, and this brief has suffered seriously in clarity and effectiveness as a result."